



Fine Print

A Quarterly Publication of The Ohio State Bar Association
and Our Members

Issue 68 • Summer 2016

Five Labor Law Developments for Your “To Review” List

By Nelson Cary, Esq. and Al Kinzer, Esq.

Employers and labor relations professionals should take steps to stay abreast of important developments under the National Labor Relations Act – and, in particular, the following “top five” list of important issues for 2016:

1. Make sure your business is ready for the Department of Labor (DOL) “persuader” final rule.

A rule that, by its terms, became applicable on July 1, 2016, made it a requirement that employers and the attorneys or consultants they hire must file reports for both direct and indirect persuader activities (which includes attorney or consultant communications with workers as well as attorney or consultant scripting of management’s communications with workers). This rule was designed to provide employees with more information about the source of campaign material. (See <http://goo.gl/dbI1iV> for more information.) However, a federal court in Texas has issued a nationwide injunction against the rule’s enforcement, so the future of the rule is uncertain and employers should monitor it closely.



2. Examine the impact of the National Labor Relations Board’s (NLRB) new standard for determining if two entities are joint employers.

(See <https://goo.gl/aLfL2i> or <http://goo.gl/TeUv6y>). To make sure your firm is following the new standard, you should identify and address any joint employer risks that may lurk in your company’s contractual arrangements and in the course of your dealings with temporary service firms, subcontractors and others.

3. Prepare for more new NLRB rules on temporary employees.

During the Clinton administration,

the NLRB made it easier to include temporary employees in a bargaining unit, but during the second Bush administration, the NLRB reverted to a previous long-standing rule. This older rule held that the consent of both the temporary services company as well as the company using its services (the “user” company) was required before temporary employees could be included in a bargaining unit made up of the user employer’s employees. The NLRB has invited amicus briefs concerning this question in Miller & Anderson, Inc., an action that generally foreshadows a rule change.

4. Examine the first full year of data from the NLRB’s quickie (or “ambush”) election rule.

(See <http://goo.gl/sBp6XX>.) Employers and labor professionals should study the data that has been collected since this rule became effective more than a year ago.

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New Rule on STEM OPT Extension: What U.S. Employers Need to Know Before Hiring International Students

By Jaclyn C. Celebrezze, Esq.

On May 10, 2016, the Department of Homeland Security (DHS) published its new rule on STEM Optional Practical Training (STEM OPT). The STEM OPT program now allows eligible, recent graduates of U.S. educational institutions to obtain practical training in certain science, technology, engineering or mathematics (STEM) fields. Employers in the STEM sector considering

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This data will give labor professionals a more reliable basis for evaluating the rule's impact on the number of union elections held, the number of union wins, and the time between filing a petition and holding an election.

5. Watch for the NLRB to require Weingarten rights in non-union workplaces. During the Clinton administration, the NLRB ruled that non-union employees have the right to have a co-worker present during an employer's investigatory interview that may lead to discipline. The NLRB's decision in *Epilepsy Foundation* rested on the U.S. Supreme Court *Weingarten* case, holding that union employees have the right to have their union steward present during investigatory interviews. During the Bush administration that followed, the NLRB reversed *Epilepsy Foundation*, ruling that non-union employees did not have the right to have a co-worker present during investigatory interviews. Now, the NLRB appears ready to change course again.

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You Should Know:

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hiring recent international graduates, will want to review the new required processes and procedures to ensure they remain compliant.

Some of the highlighted changes include:

■ Extension of the STEM OPT period to 24 months from 17 months

■ Establishment of a required training plan (training plan for STEM OPT students) that:

- Must be signed by student and an appropriate individual in the employer's organization
- Must be completed once every 12 months
- Must be provided to the Designated School Official (DSO)

■ The inclusion of a provision allowing for employer site visits:

- Employers will be notified 48 hours in advance of a visit, unless the site visit is to address a complaint or evidence of noncompliance, in which case no notice will be provided.

■ Creation of a concrete definition of what constitutes an eligible STEM program and an ongoing source for updates on eligible fields

■ A provision allowing F-1 students who have previously received STEM degrees to apply for a STEM OPT extension if:

- The degree was received from an accredited institution at the time of application for the STEM OPT
- The accredited institution is SEVP-approved
- The position directly relates to the STEM degree program

Employers in the STEM sector considering hiring recent international graduates, will want to review the new required processes and procedures to ensure they remain compliant.

■ A provision requiring a STEM OPT employer to attest the student will not replace a full- or part-time, temporary or permanent U.S. worker

■ A provision that maintains the 90-day limit on unemployment during an individual's initial 12-month post-completion optional practical training, but extends the STEM OPT limit to 150 days of unemployment.

This new STEM OPT rule also maintains many of the 2008 Rule on STEM OPT provisions. This new rule still:

■ Requires all employers of STEM OPT individuals to be enrolled in E-Verify and to be in good standing

■ Requires employers to report changes in

a STEM OPT individual's employment within five business days

■ Requires STEM OPT individuals to report name/address changes or changes in employment to their Designated School Official (DSO)

■ Allows for a cap-gap extension of a student's F-1 and OPT for timely filed H-1B petitions

Employers or STEM-eligible applicants with questions or concerns regarding this new rule and its implementation should contact immigration counsel for further information on their responsibilities before hiring an international student.

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